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PAY-TO-PLAY: *McCUTCHEON V. FEC*'S ROBUST EFFECT ON FEDERAL AND STATE CONTRACTOR CONTRIBUTION REGULATIONS

Tyler C. Stearns

I. INTRODUCTION

On April 2, 2014, the United States Supreme Court issued the opinion in *McCutcheon v. FEC*.¹ *McCutcheon* was among a series of cases involving campaign finance regulations which came into public consciousness following the well-publicized 2012 decision in *Citizens United v. FEC*.² *McCutcheon* involved a challenge to portions of the Federal Election Campaign Act of 1971 (“FECA”), specifically the portion of FECA that imposes aggregate limits on the amount of money individuals may contribute to candidates and parties in federal elections.³ The *McCutcheon* plaintiffs argued that the aggregate limits violated their right to make political contributions, a right protected by the First Amendment.⁴ Prior to the *McCutcheon*, decision, the aggregate limits imposed a \$123,200 per election cycle limit on the total amount of money individuals may contribute to all federal elective candidates.⁵ The question presented to the Court in *McCutcheon* was whether the aggregate limits of FECA were valid under the First Amendment. The Court’s answer to this question undermines over thirty years of campaign finance regulation and jurisprudence; and arguably will have serious ramifications on influence of political contributions in federal and state elections.

Announcing the opinion of the Court, Chief Justice Roberts reinforced that a citizen’s right to participate in democracy through political contributions is protected by the First Amendment.⁶

¹ <http://www.fec.gov/law/litigation/McCutcheon.shtml>.

² *McCutcheon v. FEC*, 134 S. Ct. 1434, 1436 (2014).

³ *Id.*

⁴ *Buckley v. Valeo*, 424 U.S. 1.

⁵ *See infra*, Part III.

⁶ *McCutcheon* at 1436.

However, the Chief Justice emphasized that this “right is not absolute, and Congress may impose certain limitations.”⁷ The Court’s holding reasoned that the aggregate contribution limits were unconstitutional; stating that limits to political contributions are valid only if their purpose is to prevent quid pro quo corruption (or its appearance), and the regulation is closely drawn to meet that purpose.⁸ Following the Court’s decision, individuals can contribute money to any federal candidate within the base limits set forth in FECA.⁹ Consequently, following the *McCutcheon* decision, an individual could theoretically donate in excess of \$1.5 million dollars per election cycle.¹⁰ For context, in 2010 Democrats and Republicans raised \$1.5 billion for Congressional races.¹¹ Thus, if the aggregate limits were struck down prior to the 2010 election, 429 individuals contributing the approximate \$1.5 million, maximum could have theoretically funded every winning Congressional candidate.¹²

The previous example, while not representing fact or likely reality following the *McCutcheon* decision, it exposes the potential serious implications of the Supreme Court’s decision. Those implications extend beyond the validity of the aggregate contribution limits in FECA and other regulations.¹³ Outside of the increased dollar amounts stemming from the *McCutcheon* decision, the Court’s refined analysis of permissible campaign finance regulations, which address quid pro quo corruption, raises questions as to the validity of “pay-to-play” regulations or regulations addressing contributions by government contractors. Pay-to-play regulations are designed to prevent individuals or companies contracting with the government

⁷ *Id.*

⁸ *Id.*

⁹ *See infra*, Part II (discussing the Court’s reasoning in upholding the base limits and delimiting the permissible amounts an individual may contribute to candidates and parties).

¹⁰ *See infra*, Part V.

¹¹ Proposing an Amendment to the Constitution of the United States Relating to Contributions and Expenditures Intended to Affect Elections, 113 S. Rpt. 223, 21.

¹² *Id.*

¹³ *See infra*, Part II.

from using monetary contributions to influence the award of future contracts and exert increased political influence. This Note argues that the *McCutcheon* decision will have far reaching, detrimental effects on campaign finance regulations, specifically focusing on pay-to-play regulations.

This Note begins by examining the breadth of the protections the First Amendment provides to political contributions¹⁴ Part I sets out the background and history of federal jurisprudence with respect to regulation of political contributions. Part II focuses on the Supreme Court’s analysis of political contribution regulations in *McCutcheon*. Part III discusses and reviews prior state and federal pay-to-play regulations by applying the Supreme Court’s analysis in *McCutcheon*. Part IV discusses the effect of campaign contributions on federal contract awards and how the *McCutcheon* decision implicates federal contractor contributions. Furthermore, Part V applies the *McCutcheon* decision to the federal and state pay-to-play regulations, and concludes that the Court’s ruling in *McCutcheon* may invalidate or force reformation of federal and state pay-to-play regulations. Part VI analyzes the practical implications of the *McCutcheon* decision on campaign financing.

II: HISTORY OF CAMPAIGN FINANCE REGULATION — *BUCKLEY V. VALEO*

*“No enemy of free government [is] more dangerous and none so insidious” as contributions by corporations for political reasons.*¹⁵

– President Theodore Roosevelt

Addressing Congress in 1904, President Roosevelt underscored the threat of corruption arising from political contributions, calling for “vigorous measures to eradicate” perceived

¹⁴ See *infra*, Part III.

¹⁵ Theodore Roosevelt, President of the United States, *Fourth Annual Message to the Senate and House of Representatives*, available at <http://www.presidency.ucsb.edu/ws/?pid=29545>.

political corruption.¹⁶ In his address, the President emphasized Congress's role in addressing political corruption, stating:

[i]t is accepted that Congress has power under the Constitution to regulate the election of federal officers, including the President and the Vice President.¹⁷ This includes the authority to protect the elective processes against the 'two great natural and historical enemies of all republics, open violence and **insidious corruption**.'¹⁸

In his annual address to Congress in December 1905, President Roosevelt echoed his previous calls for campaign finance regulations stating, "all contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts."¹⁹ Again in 1906, President Roosevelt urged Congress to enact "a law prohibiting corporations from contributing to the campaign expenses of any party."²⁰ Congress responded in 1907 by enacting the Tillman Act, the first campaign finance law addressing political contributions.²¹ The Tillman Act made it unlawful for national banks or corporations to contribute money to federal campaigns and opened the door for Congress to take a more pragmatic approach to campaign finance regulation.²² Following the Tillman Act, Congress passed additional campaign finance reforms including, the Federal Corrupt Practices Act of 1925, the Hatch Act of 1939, the Smith-Connally Act of 1943, and the Taft-Hartley Act of 1947.²³ Each of these

¹⁶ *Id.*

¹⁷ *Buckley v. Valeo*, 424 U.S. 1 (1976) (White, J., concurring).

¹⁸ *Buckley* at 257 (quoting, *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884)) (emphasis added).

¹⁹ Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* xvii (1988).

²⁰ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 509 (quoting 41 Cong. Rec. 22 (1906)).

²¹ See Jaime Fuller, *From George Washington to Shaun McCutcheon: A brief-ish history of campaign finance reform*, WASHINGTON POST, April 3, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/>.

²² Fed. Election Comm'n, Appendix 4: The Federal Election Campaign Laws: A Short History (accessed April 1, 2015), available at <http://www.fec.gov/info/appfour.htm>.

²³ Federal Corrupt Practices Act, 43 Stat. 1070 (1925) (imposing disclosure requirements on House, Senate and primary candidates; requiring reporting of contributions over \$100, and raising Senate expenditure limits to \$25,000); Hatch Act of 1939, 5 U.S.C. 7321-7326 (empowering Congress to regulate primary elections and included

regulations was crafted with the goal of preventing corruption or the appearance of corruption, which arises from monetary contributions by individuals made in exchange for political influence.²⁴ However, between 1947 and 1971, Congress took little if any action to curb the growing influence of money in politics and did little to enforce the pre-existing regulations passed between 1907 and 1947.²⁵ Notably, following Richard Nixon's election in 1969, the Clerk of the House of Representatives notified the Justice Department of twenty fund-raising Committees associated with now President Nixon that failed to file a single campaign finance disclosure report.²⁶ The Justice Department responded the following year.²⁷ In its response, the Justice Department announced that "none of the violators would be prosecuted . . . given the history of the act" and that enforcement would be unfair.²⁸ In other words, the Justice Department decided that because they had not previously enforced campaign finance reporting obligations, individuals should not be punished for failing to abide by the reporting regulations.²⁹ This Justice Department decision purportedly ended their passive approach to enforcement of campaign finance regulations as it declared future violators would be prosecuted.³⁰ The failure of Congress to enact more stringent campaign finance regulations, combined with the Justice Department's passive

limitations on contributions and expenditures in Congressional elections); Smith-Connally Act of 1943 (expanding the scope of the Tillman Act to include unions among the entities prohibited from contributing money to federal campaigns); Taft-Hartley Act, Pub. L. 80-101 (1947) (prohibiting corporations and unions from making independent expenditures in federal political campaigns).

²⁴ FEC, *supra* note 16.

²⁵ See Melvin I. Urofsky, *A Symposium on Campaign Finance Reform: Past, Present, and Future: Article: Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 25-32 (discussing Congressional in-fighting during this period which prevented the passage of additional campaign finance reform).

²⁶ *Id.* at 32.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

enforcement of the pre-existing regulations made it readily apparent that reform was necessary. Such reform emerged two years later with the passage Federal Election Campaign Act of 1971.³¹

FECA was a complete overhaul of federal campaign finance and election laws. FECA broadened reporting and disclosure requirements for political contributions, imposed limitations on contributions and expenditures, and created provisions for public financing of federal campaigns.³² In 1974, Congress passed amendments to FECA, including increased limitations on contributions and expenditures, and critically created the Federal Election Commission; an independent agency charged with regulation and enforcement of the federal election laws.³³ FECA's wide-ranging reforms helped lift the veil on the use of money in political campaigns, but also raised questions as to constitutional implications of limitations on contributions and expenditures. In response to FECA and the 1974 Amendments, Senator James L. Buckley and Eugene McCarthy challenged the constitutionality of the contribution and expenditure limits, arguing that the regulations impermissibly abridged constitutionally protected First Amendment rights.³⁴ Buckley and McCarthy's challenge to FECA was the first time the Supreme Court was asked to evaluate the validity of contribution and expenditure limits and shaped future legislation and judicial review of campaign finance regulations.

The expenditure and contribution limits in FECA implicated the First Amendment's protection on political association and political expression.³⁵ Discussing these rights in in *NAACP v. Alabama*³⁶, the Court recognized that "effective advocacy of both public and private points of

³¹ See Jaime Fuller, *From George Washington to Shaun McCutcheon: A brief-ish history of campaign finance reform*, WASHINGTON POST, April 3, 2014 (explaining that FECA was amended in 1974 in response to the Watergate Scandal).

³² *Buckley*, 424 U.S. at 258.

³³ Fed. Election Comm'n, Appendix 4: The Federal Election Campaign Laws: A Short History (accessed April 1, 2015), available at <http://www.fec.gov/info/appfour.htm>.

³⁴ Eugene McCarthy was a former Democratic Congressman and Senator from Minnesota.

³⁵ *Buckley* at 15.

³⁶ *NAACP v. Alabama*, 357 U.S. 449 (1958).

view, particularly controversial ones, is undeniably enhanced by group association.”³⁷ With political association and political expression in mind, the *Buckley* Court expressed that FECA’s contribution and expenditure limits operate in an area of the most fundamental First Amendment activities.³⁸ Thus, because the contribution and expenditure limits implicate First Amendment rights, the first question considered by the *Buckley* Court’s review of the FECA regulations was to what extent the limits abridge First Amendment rights.

The Court’s analysis distinguished the effect the base and aggregate limits had upon the exercise of First Amendment rights.³⁹ FECA limited the permissible expenditures to a candidate to \$1,000 per election.⁴⁰ The *Buckley* Court stated that the \$1,000 limit appeared to “exclude all citizens and groups, except candidates, political parties, and the institutional press” from substantial use of important methods of communications.⁴¹ The Court reasoned that this limitation on every citizen’s ability to exercise political speech inhibited political discussion and the quantity of political expression.⁴² Such limitations, the Court found, substantially controlled the quantity and diversity of political speech.⁴³ Thus, because expenditure limits constrain political discussion and expression, the Court found that such regulations are subject to “the exacting scrutiny applicable to limitations on core First Amendment rights.”⁴⁴ The Court explained that under exacting or strict scrutiny, the government may regulate expenditure limits *only* if the regulation promotes a *compelling interest* and is the *least restrictive* means to further the articulated interest.⁴⁵

³⁷ *Id.* at 460.

³⁸ *Buckley* at 14.

³⁹ *Id.* at 14.

⁴⁰ 18 U.S.C. § 608 (e)(1) (1970 ed., Supp. IV).

⁴¹ See *Buckley*, *supra* note 20 (noting that a full-page newspaper advertisement in 1975 cost \$6,971.04, well above the \$1,000 expenditure limit).

⁴² *Buckley*, 424 U.S. at 19-20.

⁴³ *Id.*

⁴⁴ *Buckley* at 44-45.

⁴⁵ *Id.* (emphasis added).

Notably, the Court’s review of contribution limits departed from the strict scrutiny standard applicable to the expenditure limits and led to a notably different conclusion respecting contribution regulations.⁴⁶

The *Buckley* Court reasoned that campaign contributions were a lesser restraint on protected First Amendment speech, and therefore contribution regulations should be subject to a different level of scrutiny.⁴⁷ Under FECA, individuals and groups were permitted to contribute up to \$1,000 per election and party committees were permitted to donate \$5,000 to a single candidate.⁴⁸ FECA further limited overall contributions by individuals and groups to all candidates to \$25,000 per calendar year.⁴⁹ Its analysis, the Court noted that, “a contribution serves as a general expression of support for the candidate’s views, but does not communicate the underlying basis for the support.”⁵⁰ According to the Court, the key difference was the communication aspect of the regulations. The Court reasoned that expenditures allow individuals to express in their own manner the reasons why they support a candidate, or the reasons they believe a candidate should be elected. Conversely, campaign contributions “permit the symbolic expression of support evidenced by a contribution”, but did not infringe the contributor’s freedom to discuss candidates and issues.⁵¹ This distinction led the Court to closely drawn scrutiny, a diminished yet “rigorous standard of review” to limitations on political contributions.⁵²

To survive strict scrutiny, an expenditure limit regulation must show (1) a compelling government interest and (2) employ the “least restrictive means” necessary to achieve the

⁴⁶ *Buckley* at 20-21.

⁴⁷ *McCutcheon*, 134 S. Ct. at 1437.

⁴⁸ 18 U.S.C. § 608 (b)(1)-(2) (1970 ed., Supp. IV).

⁴⁹ 18 U.S.C. § 608 (b)(3) (1970 ed., Supp. IV).

⁵⁰ *McCutcheon* at 1437.

⁵¹ *Buckley*, 424 U.S. at 21.

⁵² *Buckley* at 29.

compelling government interest.⁵³ Comparatively, contribution limits are subject closely drawn scrutiny, where “the State [must] demonstrate a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”⁵⁴ Thus, the *Buckley* court created a critical distinction for contribution regulations in applying closely drawn scrutiny. This level of scrutiny allows Congress and legislatures greater leeway in enacting regulations limiting campaign contributions, by permitting these regulations to abridge upon First Amendment rights so long as they do not *unnecessarily abridge associational freedom*.⁵⁵

Another product of the *Buckley* decision was the Court’s finding that the prevention of quid pro quo corruption or its appearance qualifies as a sufficiently important government interest.⁵⁶ The *Buckley* court ultimately concludes that the campaign contribution regulations in FECA were valid because they employed means closely drawn to prevent quid pro quo corruption, and that such regulations did not unnecessarily abridge associational freedoms.⁵⁷ Future decisions helped solidify the Court’s conclusions regarding the campaign contributions as permissible to prevent quid pro quo corruption and are discussed hereafter.

Additional support for base limits on contributions can be found in *Nixon v. Shrink*.⁵⁸ *Nixon* involved a challenged to a Missouri state law that imposed limits on contributions by individuals to state office candidates to \$275 and \$1,075.⁵⁹ Petitioners challenged the law, alleging that the contribution limits violated their First Amendment rights.⁶⁰ The Court upheld the Missouri limits; applying closely drawn scrutiny in holding that there is “no reason in logic or evidence to doubt

⁵³ See *supra* note 38.

⁵⁴ *Buckley* at 25 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975)).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 528 U.S. 377 (2000).

⁵⁹ *Nixon* at 383.

⁶⁰ *Id.* (Petitioners’ Complaint did not specify what First Amendment rights were violated, however the Court postulated that the regulation implicated freedom of speech and freedom of association).

the sufficiency of *Buckley* to govern the Missouri case”.⁶¹ The Court in *Nixon* reemphasized the reasoning in *Buckley* that, “the prevention of corruption and the appearance of corruption” was found to be a “constitutionally sufficient justification”, and found authority for Missouri’s law and other state limits on contributions in the *Buckley* ruling.⁶²

Contribution limits withstood further scrutiny in *McConnell v. FEC*.⁶³ *McConnell* involved a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA).⁶⁴ The BCRA codified prohibitions on soft money donations, or donations solicited to a party or committee instead of to a particular candidate.⁶⁵ In *McConnell*, the Court upheld the soft money prohibitions despite petitioner’s arguments that there was no concrete evidence of real or apparent corruption.⁶⁶ The Court reasoned that the soft money prohibitions prevented ‘undue influence on officeholders’ judgment, and the appearance of corruption.⁶⁷ Critically, the *McConnell* court articulated that Congress’ interest in preventing quid pro quo corruption extends beyond “simple cash-for-votes corruption”.⁶⁸ The Court concentrated on evidence of access in exchange for soft money donations in finding that the contribution bans were sufficient to conclude that the soft money donations in the BCRA were a valid exercise of Congress’ prevention of the appearance of quid pro quo corruption.⁶⁹

The takeaway from the Court’s decision in *Buckley* and later contribution regulation decisions was that Congress may enact limitations on political contributions, subject to certain

⁶¹ *Id.*

⁶² *Id.* at 379, 397- 98.

⁶³ 540 U.S. 93 (2003).

⁶⁴ 116 Stat. 81.

⁶⁵ *McConnell v. FEC*, 540 U.S. 93 (2003) (citing 2 U.S.C. § 441i(a) (Supp.II)).

⁶⁶ *McConnell* at 153.

⁶⁷ *Id.* (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S.431, 441).

⁶⁸ *McConnell* at 150-151.

⁶⁹ *Id.*

requirements.⁷⁰ The court determined in *Buckley* that regulations related to political contributions must (1) have the goal of preventing quid pro quo corruption or its appearance, and (2) the regulations must be closely drawn to meet that goal without unnecessarily abridging First Amendment or other constitutional freedoms.⁷¹ This reasoning is repeatedly relied upon and upheld in later decisions, and Congress and state legislatures have utilized these conclusions in drafting campaign finance laws.⁷² The contribution limits, while deemed valid by *Buckley* and cases challenging comparable contribution regulations, became the subject of further scrutiny thirty-five years later in *McCutcheon*. The Court's decision in *McCutcheon* agreed with the "closely drawn" scrutiny standard from *Buckley* validating the base contribution limits, but disagreed with the Court's conclusion in *Buckley* respecting aggregate limits on campaign contributions.⁷³ The *McCutcheon* decision and revised analysis of aggregate contribution limits changed the outlook on aggregate contribution limits and brings into question the constitutionality of comparable regulations.

PART III: MCCUTCHEON V. FEDERAL ELECTION COMMISSION

McCutcheon involved a challenge to the constitutionality of 2 U.S.C. § 441a(a)(1) and § 441a(a)(3).⁷⁴ 2 U.S.C. § 441a(a)(1) addresses base limit contributions any "person" may make to individual candidate and political committee, limiting individuals to contribute \$5,200 to a candidate, \$32,000 to a national party committee, \$10,000 to a local or state party committee, and \$5,000 to a political action committee.⁷⁵ § 441a(a)(3) provides for aggregate contribution limits an

⁷⁰ *Buckley*, 424 U.S. 1 at 39.

⁷¹ *Buckley* at 39-59.

⁷² See *Randall v. Sorrell*, 548 U.S. 230, 235 (2006).

⁷³ *McCutcheon*, 134 S. Ct. 1434 at 1437-40.

⁷⁴ *McCutcheon* at 1436.

⁷⁵ 2 U.S.C. § 441a(a)(1).

individual may make over a two year period to all candidates or committees.⁷⁶ The aggregate contribution limit mandates that an individual may contribute up to \$123,200 to candidate and non-candidate committees during a two-year election cycle.⁷⁷ The plaintiffs in *McCutcheon* challenged the constitutionality of the aggregate limits regulated by 2 U.S.C. § 441a(a)(3), arguing that the aggregate limits are not closely drawn to prevent quid pro quo corruption.⁷⁸

By way of background, the district court dismissed Plaintiff's action, echoing *Buckley* in concluding that the aggregate limits in FECA survived First Amendment scrutiny because the Government had a legitimate interest in preventing "evasion of the base limits."⁷⁹ In part, the district court reached this finding after considering a hypothetical situation whereby a single donor could contribute to multiple committees and those committees could thereafter transfer the money to a single committee, thus combining the contributions to exceed the base limits.⁸⁰ This purported loophole was foreseen as one example of how a donor may circumvent the base limits, and therefore justified the requirement for aggregate limits.⁸¹ The Supreme Court disagreed with the district court's ruling.

The Supreme Court's analysis began by distinguishing between the "base limits" and the "aggregate limits."⁸² Among the differences, the Court noted that the base limits are a restriction on the amount of money a donor may contribute to a specific candidate or committee.⁸³ By comparison, the aggregate limits impose restrictions on *the number of candidates* a donor may contribute to, subject to the limitations of the base limits.⁸⁴ The difference between quantity of

⁷⁶ 2 U.S.C. § 441a(a)(3).

⁷⁷ *Id.*

⁷⁸ *McCutcheon* at 1442.

⁷⁹ *Id.*

⁸⁰ 893 F. Supp. 2d 133, 140 (2012); *see* *Randall v. Sorrell*, 548 U.S. 126 (2006).

⁸¹ *McCutcheon*, 134 S. Ct. 1434 at 1442.

⁸² *Id.* at 1438–39.

⁸³ *McCutcheon* at 1448.

⁸⁴ *Id.* (emphasis added).

money an individual may contribute to a candidate and the quantity of candidates to whom an individual may contribute money became the critical distinction in the Court’s ruling.⁸⁵ The issue facing the Court was whether a restriction upon the number of candidates a donor contributes to satisfy closely drawn scrutiny standard under *Buckley*.

The Supreme Court concluded that when evaluating regulations which target political contributions such regulations are subject to closely drawn scrutiny, and must target “quid pro quo” corruption or its appearance.⁸⁶ “Quid pro quo” corruption suggests the notion of a “direct exchange of an official act for money.”⁸⁷ “The hallmark of corruption is the financial quid pro quo: dollars for political favors.”⁸⁸ In *Buckley*, the Court noted that the \$25,000 aggregate limit imposed a restriction on the number of candidates and committees to whom an individual may contribute.⁸⁹ The *Buckley* Court considered the aggregate limits as modest restrictions on First Amendment speech and thereby permissible to prevent the appearance of quid pro quo corruption through circumvention of the base limits.⁹⁰ The *McCutcheon* plurality disagreed with the validity of the latter conclusion emphasizing that “an aggregate limit on *how many* candidates and committees an individual may support . . . is not a ‘modest restraint’ at all.”⁹¹ The Court considered that absent a sufficient nexus between the political contribution regulation and prevention of quid pro quo corruption, such regulation would therefore be invalid for impermissibly restricting First

⁸⁵ *McCutcheon* at 1463-64.

⁸⁶ *McCutcheon* at 1441, (citing *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 359).

⁸⁷ *McCutcheon*, 134 S. Ct. 1434 at 1466.

⁸⁸ *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)

⁸⁹ 424 U.S. at 28.

⁹⁰ *Id.*

⁹¹ *McCutcheon* at 1448.

Amendment speech.⁹² The Court did not find a nexus between the aggregate limits and prevention of quid pro quo contributions.⁹³

The *McCutcheon* court reasoned that in simple terms the aggregate limits prohibit fully contributing to the campaigns of ten or more candidates, even if the contributions fall within the scope of the base limits.⁹⁴ Congress, by codifying this limitation, sets forth that the aggregate limits prevent quid pro quo corruption that may stem from contributing to multiple candidates or party committees of the same party.⁹⁵ The *McCutcheon* court, however, discerned that by creating the base limits, Congress demarcated the specific contribution amounts that raise an issue of quid pro quo corruption.⁹⁶ The Court postulated that “spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to quid pro quo corruption.”⁹⁷ Furthermore, the Court disagreed with the argument that an individual who spends large sums may garner “influence over or access to” elected officials, raising the appearance of quid pro quo corruption.⁹⁸

The appearance of quid pro quo corruption, however, is applicable only to “the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder.”⁹⁹ The Court noted funneling money to a particular candidate or party gives rise to quid pro quo corruption or its appearance and may be regulated.¹⁰⁰ However, according to the *McCutcheon* court, contributing money to a party or candidate within the amounts specified in the base limits does not

⁹² *Id.*

⁹³ *Id.*; see *McConnell v. FEC*, 540 U.S. 93 (where the Court found that evidence that soft money donations raised an appearance of political corruption was sufficient to uphold the regulations prohibiting same).

⁹⁴ *McCutcheon*, 134 S. Ct. 1434 at 1448.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *McConnell* at 310.

¹⁰⁰ *McCutcheon* at 1448.

rise to an inference of quid pro quo corruption, and thus may not be subject to broad restrictions such as the aggregate limits in FECA.¹⁰¹ In other words, the Court concluded that Congress, by codifying the base limits specified the amount of money which raises an inference of quid pro quo corruption. Thus, any contributions within the base limits are per se valid, and do not raise an inference of quid pro quo corruption. Absent a connection between aggregate limits and quid pro quo corruption, the Court reasoned that the aggregate limits are unconstitutional. Proponents for the regulations argued evidence of the appearance of quid pro quo corruption is difficult, if not impossible to find.¹⁰² In response, the Court noted that “the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”¹⁰³

As a result of the court’s analysis and conclusion respecting aggregate limits, undermines thirty-five years of Supreme Court jurisprudence, and raises questions as to the validity of federal and state pay-to-play regulations. Prior to the *McCutcheon* decision, the Court declined to overrule *Buckley* in *Randall v. Sorrell*¹⁰⁴. There, the Court emphasized that overruling *Buckley* would “undermine the considerable reliance that Congress and state legislatures have placed upon its drafting of campaign finance laws.”¹⁰⁵ The *McCutcheon* Court did not exhibit the same reticence and calls for refined analysis of federal and state pay-to-play regulations. Pay-to-play regulations involve restrictions on contributions permitted by individuals contracting with the government. Such regulations are drafted and enacted with the goal of preventing individuals who make political contributions from using those contributions to gain political favor. On its face, pay-to-play regulations appear specifically designed to prevent quid pro quo corruption. However after

¹⁰¹ *McCutcheon*, 134 S. Ct. 1434 at 1448.

¹⁰² *Id.*

¹⁰³ *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (opinion of Roberts, C.J.).

¹⁰⁴ *Randall v. Sorrell*, 548 U.S. 230 (2006).

¹⁰⁵ *Id.* at 234-235.

McCutcheon, the question presented to legislatures and court’s evaluating pay-to-play regulations is whether these regulations are closely drawn to meet their goal of preventing quid pro quo corruption. There multiple federal pay-to-play regulations, in addition to a vast array of state and local pay-to-play laws and ordinances. Recently, parties have challenged the federal pay-to-play regulations, in particular the federal contractor contribution ban and the Security and Exchange Commission’s (SEC) Political Contribution Rule. The discussion of those challenges and analysis of the federal and state regulations follows.

IV: FEDERAL PAY-TO-PLAY REGULATIONS

Federal Contractor Ban on Contributions – 2 U.S.C. § 441c

The Federal Contractor Ban on Contributions is codified at 2 U.S.C. § 441c, and prohibits any “person” who contracts with the United States or any department or agencies of the United States from directly or indirectly making or soliciting contributions to any political party, committee, or candidate for public office or to any person for any political purpose or use.¹⁰⁶ The regulation within FECA, that defines a “person” to include an “individual, partnership, committee, association, corporation labor organization, or any other organization or group of persons” other than the federal government.¹⁰⁷ The regulation applies to contributions made in connection with *federal* elections, and applies only to the “person” who contracts with the government.¹⁰⁸ Of particular note are the limitations of the contribution ban is specifically tailored to the party contracting with the government only, and allows the contracting party to establish political action committees that are capable of making contributions which would otherwise be unlawful under

¹⁰⁶ 2 U.S.C. § 441c.

¹⁰⁷ 2 U.S.C. § 441c(a).

¹⁰⁸ 2 U.S.C. § 431(11).

the regulation.¹⁰⁹ In 2012, federal contractors challenged 2 U.S.C. § 441c in *Wagner v. FEC*, arguing that the regulation was unconstitutional under the First Amendment.¹¹⁰

In *Wagner*, the plaintiffs alleged that the ban on political contributions to federal contractors violates their First Amendment rights and sought a preliminary injunction preventing enforcement of 2 U.S. § 441c so that they could make contributions for the 2012 election cycle.¹¹¹ As noted in *Buckley*, regulations affecting political contributions implicate an individual's First Amendment right to freedom of speech and association.¹¹² The federal contractor ban on contributions clearly restricts federal contractors' First Amendment rights by prohibiting them from making political contributions. Thus, because the federal contractor ban limits individual's First Amendment rights, the regulation must be closely drawn to prevent quid pro quo corruption, and may not unnecessarily abridge First Amendment rights. Emphasizing judicial precedent, the district court affirmed that there is 'no doubt that preventing "pay-to-play" deals or pressure on contractors to give – or the appearance that either is occurring – is sufficiently important to warrant restrictions on political contributions by federal contractors."¹¹³ Simplified, it is clear to the district court that the contractor contribution ban was enacted to prevent quid pro quo corruption. This satisfies the district court's first inquiry regarding the validity of the regulation under closely drawn scrutiny. The second question presented to the court is whether the regulation unnecessarily abridged First Amendment rights.¹¹⁴

The contribution limit at issue in *Buckley* and *McCutcheon* differs significantly from the contribution ban at issue in *Wagner*. Simply put, the FECA regulation in *Buckley* and *McCutcheon*

¹⁰⁹ 2 U.S.C. § 441c(a); see *Wagner v. Federal Election Comm'n*, 854 F. Supp. 2d 83, 86; see also 11 C.F.R. § 115.2(a).

¹¹⁰ *Wagner* at 84.

¹¹¹ *Id.*

¹¹² See *supra* note 32; see also *Beaumont*, 539 U.S. at 161.

¹¹³ *Wagner* at 90.

¹¹⁴ *Id.*

is a *limit* upon an individual's ability to make political contributions, whereas the federal contractor contribution ban is *prohibition* or outright restriction upon an individual's ability to make political contributions. The difference between the regulations at issue in *Buckley* and *Wagner* is the scope of the regulation and not the degree of infringement upon First Amendment rights.¹¹⁵ Although an outright ban appears to impermissibly infringe upon First Amendment freedoms, courts prior to the *McCutcheon* decision repeatedly upheld contractor contribution bans as constitutional because of the close nexus between any contribution by contractors and actual or the appearance of corruption.

In *Green Party of Connecticut v. Garfield*,¹¹⁶ plaintiffs challenged Connecticut's ban on contractor campaign contributions as unconstitutional under the First Amendment.¹¹⁷ Plaintiffs argued that a ban on contractor contributions is an overly broad restriction of First Amendment speech and therefore not closely drawn to prevent *quid quo pro* corruption or its appearance.¹¹⁸ The Second Circuit upheld Connecticut's ban on contractor campaign contributions in part because the ban was a product of corruption scandals where public officials accepted gifts from contractors in exchange for state contracts.¹¹⁹ The Second Circuit noted that a ban on contractor contributions may have been overbroad to meet the interest of actual corruption.¹²⁰ However according to the Second Circuit, the recent scandals brought to light the important interest of preventing the appearance of corruption, and justified the ban in light of this interest.¹²¹ The D.C. Circuit in *Wagner*, followed the Second Circuit's reasoning in upholding the validity of 2 U.S.C. § 441c, noting that because the ban was enacted in response to a history or evidence of corruption it passes

¹¹⁵ *Id.*

¹¹⁶ *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2010).

¹¹⁷ *Id.* at 204.

¹¹⁸ *Wagner*, 854 F. Supp. 2d 83 at 90-93.

¹¹⁹ *Green Party* at 193-94.

¹²⁰ *Id.* at 94.

¹²¹ *Id.* at 204-05.

muster as closely drawn to prevent quid pro quo corruption and its appearance.¹²² Furthermore, the court found that a ban on federal contractor contributions in no way stretches the imagination to envision that individuals might make campaign contributions to curry political favor.¹²³ Finally, the court noted that “the judiciary owes special deference to legislative determinations regarding campaign contribution restrictions,” and stated that “there is less need for the court to interfere with legislative judgments where the persons affected by the ban have other meaningful avenues for political association and expression.¹²⁴ Despite the district court’s conclusions, the reasoning is subject to further scrutiny in light of the *McCutcheon* decision and resultant analysis respecting regulations designed to prevent quid pro quo corruption and its appearance.

In *McCutcheon*, the Supreme Court advised that absent evidence of direct quid pro quo corruption, the Court may regulate the appearance of corruption.¹²⁵ However, the appearance of quid pro quo corruption is applicable only to “the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder” that in turn provides or may provide political favors or access in recognition of the monetary gift.¹²⁶ Critically, the Court emphasized that “closely drawn” scrutiny requires consideration of both the government interest balanced against “unnecessary abridgment” of First Amendment rights.¹²⁷ It is clear that regulation of the federal contractor contributions is a sufficient government interest to prevent quid pro quo corruption and

¹²² *Wagner*, 854 F. Supp. 2d 83 at 90-93.

¹²³ *See, e.g., Green Party*, 616 F.3d 189, 193 (discussing corruption scandals in Connecticut that preceded ban); *see also Ognibene v. Parkes*, 671 F.3d 174, 188–89 (2d Cir. 2012) (imposition of lower contribution limits on those who do business with New York City “responded to actual pay-to-play scandals in [the city] in the 1980s”); *Blount v. SEC*, 61 F.3d 938, 944–45 (D.C.Cir.1995) (specific evidence of quid pro quo corruption unnecessary because “underwriters’ campaign contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity”; “risk of corruption is obvious and substantial”).

¹²⁴ *Wagner* at 93.

¹²⁵ *McCutcheon*, 134 S. Ct. 1434 at 1470-71.

¹²⁶ *McConnell*, 540 U.S. 93 at 310.

¹²⁷ *McCutcheon* at 30.

its appearance, the inquiry by the *Wagner* court after *McCutcheon* should be does a ban on federal contractor contributions unnecessarily abridge First Amendment rights. Prior to *McCutcheon*, the district court concluded the answer was no, the federal contractor contribution ban did not unnecessarily abridge First Amendment rights. Following the *McCutcheon* decision, the answer to that question is a resounding yes.

In its initial decision, the D.C. Circuit found that the ban on federal contractor contributions was closely drawn to prevent quid pro quo corruption or its appearance relying upon (1) the history and evidence of corruption, (2) deference to the legislature regarding the appropriateness of contribution restrictions, and (3) the avenues of political association available to federal contractors irrespective of the ban on contributions.¹²⁸ Following the *McCutcheon* decision, none of these justifications are sufficient for a finding that complete bans on federal contractor contributions are closely drawn to prevent quid pro quo corruption and its appearance. The *Wagner* court correctly found that a history of evidence and corruption underscores the notion that federal contractor contribution bans satisfy a sufficient government interest. However deference to the legislature, evidence of corruption, and the avenues of political association outside of political contributions do not support the conclusion that a complete ban on contributions does not unnecessarily abridge First Amendment freedoms and is closely drawn to satisfy that interest.

The *Wagner* court stated that when evaluating whether a regulation is closely drawn, the court's duty is to "assess the proportionality of the ban to the government's asserted interest in order to ensure that First Amendment freedoms are not impermissibly burdened."¹²⁹ On their face, Federal contractor bans move toward the most restrictive means, an outright ban, without consideration of more stringent regulation allowing federal contractors to exercise their First

¹²⁸ *Wagner*, 854 F. Supp. 2d 83 at 91-93.

¹²⁹ *Wagner* at 90.

Amendment rights. The *Wagner* court states that “the threat of corruption addressed by the provision at issue here is far from ‘illusory,’ but instead provides a reasonable basis for restricting political contributions by federal contractors.”¹³⁰ This statement is an example of the district court’s reasoning, which was valid prior to *McCutcheon*, but subject to revised scrutiny post-*McCutcheon*. The district court relied upon the Second Circuit’s reasoning in *Green Party* to conclude that a ban on contractor contributions is consistent with the First Amendment because, while a proportionally drastic measure, political contributions by contractors might create a perception of improper influence on state officials.¹³¹ This reasoning is no longer valid following *McCutcheon*. In *McCutcheon*, the Court emphasized that “the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”¹³² The *McCutcheon* Court emphasized that multiple alternatives are available to Congress which allow for appropriate regulation while simultaneously avoiding unnecessary abridgement of First Amendment freedoms.¹³³ In other words, there were less restrictive means available to Congress to achieve their goal of preventing quid pro quo corruption. A complete ban on contributions to any official, candidate, or party is overly broad, and if challenged, § 441c would likely be considered an unnecessary infringement upon a contractor’s First Amendment rights.

If § 441c is deemed invalid, such a finding would not preclude Congress from creating more specific restrictions on federal contractor contributions, but in its present form the federal contractor contribution ban does not pass muster under the *McCutcheon* analysis because it is unnecessarily infringes upon First Amendment rights and is not closely drawn to prevent quid pro quo corruption. Unlike the federal contractor contribution ban which is likely invalid following

¹³⁰ *Wagner* at 92.

¹³¹ *Wagner* at 11.

¹³² *See supra* note 101.

¹³³ *McCutcheon*, 134 S. Ct. 1434 at 1438.

the *McCutcheon* decision, the SEC Rule 206(4)-5 is an example of a contractor contribution ban that is closely drawn to prevent quid pro quo corruption.

SEC Rule 206(4)-5

The SEC adopted Rule 206(4)-5 to prevent quid pro quo corruption as it relates to investment advisers and individuals associated with investment advisors that provide investment advisory services to the government.¹³⁴ Rule 206(4)-5 was modelled after Municipal Securities Rulemaking Board's ("MSRB") Rules G-37 and G-38 that the SEC believed "significantly curbed pay-to-play practices in the municipal securities market."¹³⁵ The regulations do not ban contributions to any candidate or political party, but rather are more narrowly tailored to the officials which oversee or are potentially implicated in the award of the conflicting contract.¹³⁶ The SEC Rule involves five basic components: (1) a two-year ban on investment advisers accepting compensation for advisory services from government entities if disqualifying contributions are made; (2) a ban on directly or indirectly paying a third-party to solicit a government entity for investment advisory services; (3) a ban on soliciting or coordinating contributions to officials of government entities to which the investment adviser provides advisory services (or seeks to provide advisory services; (4) a ban on soliciting or coordinating payments to state or local political parties in jurisdictions where the investment adviser provides or seeks to provide advisory services; and (5) disclosure requirements of contributions and payments made by the advisor.¹³⁷ Compared to the federal contractor contribution ban, the SEC Rule components are more specific as to whom the investment advisors (contractors) are prohibited from making

¹³⁴ 17 CFR 275.206(4)-5

¹³⁵ 75 Fed. Reg. at 41,020.

¹³⁶ *Id.*

¹³⁷ 17 CFR 275.206(4)-5.

political contributions to. By including specific restrictions on the recipient of the contribution, the SEC Rule is more narrowly tailored to prevent quid pro quo corruption, and would pass muster under *McCutcheon*.

The critical distinction between the SEC Rule and the federal contractor ban is that the SEC Rule only proscribes activity as it relates to contributions to officials of government entities which the investment advisor provides advisory services, or to political parties in jurisdictions where the investment advisor provides services.¹³⁸ The contribution restrictions are limited solely making contributions to officials or individuals that can *influence the award of the government advisory contract*.¹³⁹ Conversely, the federal contractor contribution ban prohibits contributions to any political party, candidate, or elected official in the federal government; irrespective of whether or not that the recipient of the contribution may have influence or effect on the award of the federal contract. Thus, the SEC Rule, while limiting exercise of certain First Amendment Rights, is narrowly tailored to address direct quid pro quo corruption by proscribing donations between the contractor and the specific politicians or officials which may award the contract.¹⁴⁰ Beyond the federal regulations addressing contractor contributions and pay-to-play, multiple states have enacted comparable legislation to combat the threat of corruption in the award of government contracts. One example is the New Jersey pay-to-play regulation, which is discussed and analyzed in the following section.

V: NEW JERSEY STATE PAY-TO-PLAY REGULATIONS

¹³⁸ *Id.*

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ *Id.*

Governor James McGreevy introduced New Jersey pay-to-play regulations in 2004, issuing Executive Order No. 134. The Executive Order, later codified as N.J.S.A. 19:44A-20.4 provides that:

[a] county, or any agency thereof, shall not enter into a contract having an anticipated value in excess of \$17,500, as determined in advance and certified in writing by the county, agency or instrumentality, with a business entity, except a contract that is awarded pursuant to a fair and open process, if, during the preceding one-year period, that business entity has made a contribution that is reportable by the recipient under P.L. 1973, c.83 (C.19:44A-1 et seq.), to any county committee of a political party in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded or to any candidate committee of any person serving in an elective public office of that county when the contract is awarded, and

A business entity that has entered into a contract having an anticipated value in excess of \$17,500 with a county, or any agency or instrumentality thereof, except a contract that is awarded pursuant to a fair and open process, shall not make such a contribution, reportable by the recipient under P.K. 1973, c. 83 (C. 19:44A-1 et sq.), to any county committee of a political party in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded or any candidate committee of any person serving in an elective public office of that county when the contract is awarded, during the term of that contract.¹⁴¹

Of note, the New Jersey regulation proscribes entities holding contracts in excess of \$17,500 from making contributions over \$300 to any county committee of a political party if the party is serving in elective office where the contract was awarded.¹⁴² In enacting the regulation, the New Jersey State Senate stated that the purpose of the bill was to “reduce the risk of actual or perceived corruption”, and emphasized that such corruption may result from elected officials that award (or control the award) of the contract receiving contributions from business entities holding or seeking government contracts.¹⁴³ The constitutionality of the regulation was challenged in *New Jersey v.*

¹⁴¹ N.J.S.A. 19:44A-20.4.

¹⁴² *Id.*

¹⁴³ Senate Statement to Senate Bill S2 (2004 N.J. Sess. Law Service 72, 76).

*Soto*¹⁴⁴, wherein the New Jersey Appellate Division upheld a prohibition on contributions by casino employees.¹⁴⁵ In upholding the pay-to-play regulation, the Appellate Division applied the *Buckley* test, requiring (1) a compelling state interest; and (2) that the regulation be sufficiently narrow and rationally related to the state interest.¹⁴⁶ As discussed in this note, the Supreme Court reformed the standard applicable to campaign contribution regulations in *McCutcheon*, requiring that the regulation (1) be enacted to prevent quid pro quo corruption or its appearance in the sphere of government contracting, and (2) is closely drawn to meet that goal.¹⁴⁷ Thus, if a party challenged the New Jersey regulations following the *McCutcheon* decision, would they pass muster as being closely drawn to prevent quid pro quo corruption?

The regulations, on their face, appear narrowly tailored to prevent quid pro quo corruption by proscribing contributions from contractors to individuals that *directly affect* the award of the state contract.¹⁴⁸ Particularly, the regulations restrict contributions when an individual makes a contribution to officials, committees, candidates or political parties that control award of the contract, or serve in a district where the contract is being awarded.¹⁴⁹ Unlike the aggregate limits deemed overly broad in *McCutcheon*, preventing contributions from contractors to individuals or entities that are positioned to directly affect the award of the contract implicates direct quid pro quo corruption and is likely not an overly broad restriction on First Amendment speech. Thus, New Jersey's state pay-to-play regulations would likely pass muster under the *McCutcheon* analysis.

¹⁴⁴ *State of New Jersey v. Pedro Soto*, 565 A.2d 1088 (N.J. App. Div. 1989).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1095.

¹⁴⁷ *See supra* Part III.

¹⁴⁸ Additionally, contractors may not contribute to individuals or office holders that serve the district to whom the contractor provides services.

¹⁴⁹ *See supra* note 142.

While New Jersey imposes pay-to-play regulations at the state level, four counties in New Jersey and 170 municipalities also enacted pay-to-play laws.¹⁵⁰ Following the *McCutcheon*, each of these regulations may be subject to scrutiny by individuals seeking to make political contributions and warrants analysis.

Atlantic County

Atlantic County's pay-to-play ordinance closely mirrors the state pay-to-play regulation, but expands the scope of that regulation beyond the constitutional means justified in *McCutcheon*.¹⁵¹ Specifically, the ordinance imposes a \$2,500 aggregate contribution limit on contracting entities for contributions to "all candidates for elective County office and to officeholders with ultimate responsibility for award of the contract, and all County and state political parties, municipal party committees within Atlantic County and PACs."¹⁵² Furthermore, the ordinance prohibits the county from entering into a contract with a professional business entity that has made a contribution in the preceding calendar year to one of the above-mentioned political bodies.¹⁵³

Application of the *McCutcheon* ruling clearly invalidates the \$2,500 aggregate contribution limit on contracting entities. The analysis in *McCutcheon* requires (1) prevention of quid pro quo corruption, and (2) regulation closely drawn to prevent quid pro quo corruption. The Atlantic County regulation's prohibition on contributions to *all county and state political parties*, and *all municipal party committees* within Atlantic County would likely be considered overly broad

¹⁵⁰ Atlantic, Bergen, Burlington, Essex, Gloucester, Mercer, and Monmouth County.

¹⁵¹ Atlantic County, N.J., Ordinance No. 10 (2007), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.nj.gov%2Fstate%2Fordinances%2Fatlantic-county-board-of-chosen-freeholders-on-10.pdf&ei=wp8kVbWNBfeasOTj74CgDw&usg=AFQjCNFM1SxecOli_6GsCv-HfMV5eYRLGQ&sig2=ZBNw2y02kzLqLG_H2dCLBw&bvm=bv.90237346,d.cWc&cad=rja .

¹⁵² *Id.*

¹⁵³ *Id.*

restrictions that do not address quid pro quo corruption or its appearance.¹⁵⁴ The New Jersey pay-to-play regulation prohibits contributions to office holders or candidates that directly control or affect the award of the state contract.¹⁵⁵ The Atlantic County ordinance expands upon the contribution prohibition to include all county and state political parties and all municipal committees within Atlantic County. This expansion, absent evidence to suggest actual quid pro quo corruption does not satisfy the closely drawn standard. It is difficult to consider that contributions to state or municipal party committees prevent quid pro quo corruption as it relates to a contract awarded by a county or its departments. One may argue that state or municipal committees influence the award of contracts, however the Supreme Court emphasized that the First Amendment forces us to err on the side of protecting individuals rights.¹⁵⁶ As noted in *McCutcheon*, “there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate-for which the candidate feels obligated-and money within the base limits given widely to a candidate’s party—for which the candidate, like all other members of the party, feel grateful.”¹⁵⁷ Aggregate limits on contributions to municipal, county and state party committees are distinguishable from the base limits on contributions to the officials, officeholders, or candidates which have responsibility for award of the contract and thus likely fail to satisfy the *McCutcheon* closely drawn standard.

Bergen County

Bergen County’s pay-to-play ordinance provides a one-year prohibition on contractor contributions to any candidate for county-wide elective office or holder of elective office in Bergen

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ *See supra* note 142.

¹⁵⁶ *See supra* note 72.

¹⁵⁷ *McCutcheon*, 134 S. Ct. 1434, 1460.

County.¹⁵⁸ Furthermore, Bergen County imposes both base and aggregate limits on the amount a contracting entity may make to county-wide elective office or office holders, and an additional base limit on contributions to county political parties.¹⁵⁹

Bergen County's pay-to-play laws proscription on contributions to candidates for elective office or holders of elective office in Bergen County could likely be substantiated as a measure preventing actual quid pro quo corruption. The aggregate limits, while invalid in *McCutcheon*, are presumptively valid in Bergen County because the ordinance limits the aggregate contribution limits to county-wide elective offices or office holders, or the individuals who may be directly implicated in award of a county contract.¹⁶⁰ The Bergen County ordinance's prohibition on contribution to *county-wide* offices or office holders is distinct from Atlantic County's prohibition on contributions to *all state and municipal party committees*. Under *McCutcheon*, the Bergen County ordinance appears closely to prohibit actual quid pro quo corruption because it targets contribution limits for officials and offices directly awarding or capable of influencing the award of contracts only.

Monmouth County

Monmouth County adopted the state pay-to-play legislation codified at N.J.S.A. 19:44A-1.¹⁶¹ Monmouth County's regulations are identical to the state pay-to-play legislation. As previously discussed, New Jersey's pay-to-play regulations likely pass muster under the *McCutcheon* analysis because the regulations prohibit contributions from contractors to the politicians or individuals that are able to influence the award of the government contracts.

¹⁵⁸ Bergen County, N.J., Ord. No. 11-11 (2011)

¹⁵⁹ *Id.*

¹⁶⁰ Bergen County, N.J., Ord. No. 13-06. (2013)

¹⁶¹ Monmouth County, N.J., Resolution No. 2012-0071.

Therefore, because Monmouth County’s regulations are identical to the state pay-to-play regulations, Monmouth County’s regulations would pass muster if challenged.

VI: INFLUENCE OF CAMPAIGN CONTRIBUTIONS ON FEDERAL ELECTIONS AND THE AWARD OF FEDERAL CONTRACTS

A 2011 study examined the success of corporations in securing government contracts through campaign donations.¹⁶² The researcher conducted case studies of two instances of politically motivated contracts — one related to the Iraq war and the other with Hurricane Katrina — and analyzed data from 367 firms with corporate PACs active between 1979 and 2006 across a variety of industries. The study determined that for each additional \$201,220 in campaign contributions, a firm could expect to receive an additional 107 contracts on average. This translates into roughly \$5,300,000 in additional revenues.¹⁶³ These examples clearly demonstrate, at a minimum, a correlation between campaign contributions and the award of federal contracts. At worst, it indicates that money not only buys access, but influences contract award decisions and firm profits.¹⁶⁴

According to the FEC, a record-breaking \$7 billion was spent on federal elections in 2012.¹⁶⁵ Critics of the Supreme Court’s decisions in *Citizens United* and *McCutcheon* attribute the record breaking amount of money in federal elections to the departure from regulations limiting corporate expenditures and aggregate limits on individual contributions.¹⁶⁶ Analysis of successfully Congressional races is an instructive example of the potential effect of the *McCutcheon* decision. The Center for Responsive Politics found that in 2012, the average winner

¹⁶² Christopher Witko, “Campaign Contributions, Access and Government Contracting”. J. PUBLIC ADM. RES. THEORY, 21:761-778 (2011).

¹⁶³ *Id.* at 774.

¹⁶⁴ Proposing an Amendment to the Constitution of the United States Relating to Contributions and Expenditures Intended to Affect Elections, 113 S. Rpt. 223.

¹⁶⁵ *Id.* at 21.

¹⁶⁶ *Id.*

of a Congressional race spent \$1.5 million.¹⁶⁷ The *McCutcheon* decision eliminated the \$123,200 per cycle cap on individual donations to federal candidates.¹⁶⁸ Thus, following the decision, individual donors are capable of giving up to \$3.5 million each cycle to all federal candidates, PACs and political parties.¹⁶⁹ Assuming the average winner of a Congressional race needs to spend approximately \$1.5-2 million; one wealthy donor could theoretically fund two winning Congressional candidates.¹⁷⁰ Taking the numbers a step further, Democrats and Republicans raised \$1.5 billion for Congressional races in 2010; thus, 429 donors, each donating the \$1.5 million maximum post *McCutcheon* could fund the winning candidates in the 2010 election.¹⁷¹ In other words, if the aggregate limits were struck down prior to the 2010 election, 429 individuals could have theoretically funded every winning Congressional candidate.

While it is unlikely that 429 individuals will control the outcome of every federal election in 2016, the example above elucidates that at the very least *McCutcheon* will increase the amount of money in politics, and enables donors with deeper pockets to exert influence through political contributions that the average voter is unable to. In the 2012 election, 28% of all disclosed political contributions came from 31,385 individuals.¹⁷² This equates to approximately one ten-thousandth of the U.S. population making over a quarter of the political contributions for the 2012 election.¹⁷³ The gap between the average voting citizen and citizens exerting political influence will only widen following the *McCutcheon* decision. The effect of the decision is not limited to federal

¹⁶⁷ *Id.*

¹⁶⁸ *See supra* Part III.

¹⁶⁹ 113 S. Rpt. 223 at 21.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Lee Drutman, *The Political 1% of the 1% in 2012*

http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/.

¹⁷³ *Id.*

politics, but will trickle down to the state level as state legislatures review and revise their pay-to-play legislation to comport with the *McCutcheon* decision.

CONCLUSION

The Supreme Court's decision in *McCutcheon* struck down the aggregate campaign contribution limits in FECA. In *McCutcheon*, the Court determined that aggregate campaign contribution limits do not combat the valid constitutional interest of preventing quid pro quo corruption and therefore fail to satisfy the closely drawn scrutiny standard. This Note argues that applying the *McCutcheon* analysis has widespread effect on federal and state regulations addressing campaign contributions, specifically, the Federal Contractor Contribution ban and several of New Jersey's county's pay-to-play regulations would not survive a First Amendment challenge following application of the *McCutcheon* analysis. The remaining issue is whether the legal effect of the *McCutcheon* decision will have practical implications.¹⁷⁴ For example, if the Federal Contractor Contribution ban is deemed unconstitutional, federal contractors would be permitted to make political contributions for the first time in forty years. The effect of removing but the studies of campaign finance and political contracts shed some light on the possible result.

While many researchers agree that contributions do not influence decision-making via quid pro quo, there is evidence to support the conclusion that contributions help organized interests gain access to and develop friendly relations with Congress members, which sometimes brings tangible benefits. Firms donating more money have a greater ability to form relationships and, perhaps, receive more contracts."¹⁷⁵ After *McCutcheon*, the maximum individual contribution to a federal candidate currently is \$2,600 per election, with the primary and general counting as separate

¹⁷⁴ See *supra* Part V.

¹⁷⁵ Witko J. PUBLIC ADM. RES. THEORY, 21:761 at 763.

elections, for a total of \$5,200 per candidate during a single two-year election cycle. But in the absence of an overall cap on spending, the donor could, in theory, well over a million dollars before running out of federal candidates and committees to support.¹⁷⁶

With evidence to support the conclusion that contributions not only increase political influence, but lead to greater financial benefits, the Court's decision in *McCutcheon* will likely have far reaching implications on the already muddled area of campaign finance regulation. In the short term, the decision enables deep pockets to exert increased influence in federal elections and on the award of government contract – the long term effects, only time will tell.

¹⁷⁶ Robert K. Kelner, *The Practical Consequences of McCutcheon*, Harvard Law Review Forum, 127 Harv. L. Rev. F. 380 (2014).